

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of

**New Part 4 of the Commission's Rules
Concerning Disruptions to Communications**

ET Docket No. 04-35

**MCI COMMENTS IN SUPPORT OF THE
UNITED STATES TELECOM ASSOCIATION'S
PETITION FOR PARTIAL STAY**

**Dennis W. Guard
MCI, INC.
1133 19th Street, N.W.
Washington, D.C. 20036
(202) 736-6148**

November 26, 2004

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

New Part 4 of the Commission's Rules)
Concerning Disruptions to Communications)

ET Docket No. 04-35

**MCI COMMENTS IN SUPPORT OF THE
UNITED STATES TELECOM ASSOCIATION'S
PETITION FOR PARTIAL STAY**

MCI, Inc. ("MCI") hereby submits its comments in support of the United States Telecom Association's ("USTA") Petition for Partial Stay ("Petition") that was filed on November 19, 2004¹ in the above captioned proceeding. MCI strongly urges the Federal Communications Commission ("FCC" or "Commission") to grant USTA's stay request for the reasons set forth below.

Introduction

USTA's Petition requests that the FCC stay the enforcement of paragraph 134 of the Report and Order,² which requires that DS3s that switch to protect be counted in DS3

¹USTA Petition for Partial Stay, *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, Notice of Proposed Rulemaking, ET Docket No. 04-35 (filed Nov. 19, 2004) ("USTA Petition" or "Petition").

²*New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, Report and Order and Further Notice of Proposed Rule Making, ET Docket No. 04-35, FCC 04-188 (rel. Aug. 19, 2004) ("Report and Order").

outage minutes (*i.e.*, “Path-protect Routing” or “Simplex Event”),³ pending reconsideration of that decision. USTA’s request should be swiftly granted in light of the procedural deficiencies associated with the paragraph 134 requirement and the economic and administrative impact to carriers that will ensue when it goes into effect.

MCI agrees with USTA’s general assessment that this requirement “(1) was not properly noticed in the initial Notice of Proposed Rulemaking (NPRM), (2) does not satisfy the FCC’s own definition of an ‘outage,’ because it does not result in a degradation of customer service, and (3) would impose a significant administrative burden on the industry with no countervailing benefit.”⁴ As described more fully in the following paragraphs, MCI believes that the Petition easily satisfies the test for application of a stay, namely that:

(1) Petitioner must demonstrate a likelihood of success on the merits of the petition for review; (2) Failure to grant a stay would lead to petitioner's irreparable injury; (3) Granting of the stay would not harm other interested parties; and (4) The stay would be in the public interest.⁵

Each element of the test is discussed in more detail below.

I. Likelihood of Success on the Merits

As a threshold matter, the paragraph 134 requirement was not mentioned or even hinted at in the Notice of Proposed Rulemaking (“NPRM”)⁶ that gave rise to the Report

³ The paragraph 134 requirement involves reporting as “outages,” those events where a DS3 switches from a primary route to a “backup” or diverse route – an event where there really is no outage.

⁴ USTA Petition at 2 (citation omitted).

⁵ *in re Pocahontas Cable TV, Inc., Pocahontas, Arkansas And Newport TV Cable, Inc., Newport, Diaz, Campbell Station, And Tuckerman, Arkansas, Request for Stay*, Memorandum Opinion and Order, 64 FCC 2d 698, para. 4 (rel. April 29, 1977); *See also Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

⁶ *New Part 4 of the Commission’s Rules Concerning Disruptions to Communications*, Notice of Proposed Rulemaking, ET Docket No. 04-35 (rel. Feb. 23, 2004) (“Service Disruptions Reporting NPRM” or “NPRM”).

and Order. Rather, the NPRM led commenters to believe only active circuits – not protect-path circuits – were being considered for reporting purposes: “[w]e propose to count only working DS3s in this measure, by which we mean those actually carrying some traffic of any type at the time of a failure.”⁷ As a result, parties did not have an opportunity to comment on the burdens associated with this requirement, thus leaving no record on this issue in the docket. Imposing rules in this fashion violates the Administrative Procedure Act (“APA”). In particular, when an agency seeks to enact new rules, the APA requires a general notice of proposed rule making published in the Federal Register that includes “either the terms or substance of the proposed rule or a description of the subjects and issues involved.”⁸ Nothing of the sort relating to protect-path reporting was provided in the NPRM.

In addition to being procedurally infirm, the paragraph 134 requirement is unreasonably burdensome, especially in light of the limited value of the information sought by implementing it. USTA points out that the combined estimates from six companies on the costs of complying with the protect-path reporting requirement *alone* totals in the tens of millions of dollars,⁹ while the number of additional reports is expected to exceed 1,000 per carrier for the larger carriers.¹⁰ Indeed, MCI’s preliminary estimates indicate that the number of new reports it will be required to file as a result of this requirement will exceed 5,000 and could be as high as 8,000, with an annual cost approaching one million dollars.

⁷ NPRM, para. 47.

⁸ 5 U.S.C. § 553(b)(3).

⁹ USTA Petition at 3.

¹⁰ *Id.* at 10-11.

All of these facts suggest a high probability of success on the merits. Moreover, as USTA highlights, the paragraph 134 requirement does not even comport with the FCC’s own definition of outage.¹¹ An “outage” is defined in the new rules as “a significant degradation in the ability of an end user to establish and maintain a channel of communications as a result of failure or degradation in the performance of a communications provider’s network.”¹² In the case of a protect-path routing scenario, there is no degradation – let alone a “significant” degradation – in an end user’s ability to establish and maintain a communications channel. By definition, upon failure of the primary path, the communications channel will switch to the protect-path – with no degradation in quality or availability. Indeed, the whole purpose of protect-path routing is to prevent failure or degradation of service. Additionally, in many cases there are multiple diverse paths to accommodate the failed primary channel, further ensuring unfettered communications. In any event, it is not at all clear that there is any value in compiling protect-path routing data. In fact, it is quite possible that this data could give rise to a distorted view of the robustness of modern telecommunications networks because many thousands of “outages” will be reported annually by the telecommunications industry, when in fact very few of these events entailed failure or degradation of service.

II. Failure to Grant would Lead to Irreparable Injury

USTA provides ample evidence of the harm that will follow in the wake of this requirement. As noted above, the paragraph 134 requirement would result in the

¹¹*Id.* at 7.

unreasonable expenditure of tens of millions of dollars, the generation of thousands of additional reports, and a resulting compilation of data of questionable value. In fact, two of USTA's smaller members estimate they will spend in the neighborhood of \$16 million *each* to comply with the protect-path reporting requirement.¹³

USTA's members are not the only carriers impacted. As indicated above, MCI will suffer injury as a result of the requirement. Additionally, Sprint has indicated that it will be severely burdened by the new reporting requirement.¹⁴

III. Granting the Stay Would Not Harm Other Interested Parties

Because end-user customers do not actually experience loss or degradation of service in the wake of a DS3 simplex event, a stay of the new procedures would not result in harm to end users. Nor is there any evidence to suggest that other third parties would be harmed by the limited stay requested by USTA. It is clear, however, that implementation of the paragraph 134 requirement will impose significant burdens on all carriers. Additionally, this information has never been reported to the Commission in the past, so no harm would come from it not being reported at this time. Grant of the stay would simply preserve the *status quo* as USTA notes.¹⁵ Accordingly, grant of the requested stay would relieve carriers of the immediate requirement that they expend significant resources – potentially unnecessarily – to report protect-path routing events, with no resulting harm to other third parties.

¹² Report and Order, Appendix B, Section 4.5(a).

¹³ USTA Petition at 12-13.

¹⁴ See Letter from Michael Fingerhut, Sprint, to Marlene Dortch, FCC, ET Docket No. 04-35 at 2 (filed Nov. 8, 2004).

¹⁵ USTA Petition at 13.

IV. The Stay is in the Public Interest

Grant of the stay is entirely consistent with the public interest. The protect-path reporting requirement will result in extensive economic and administrative harm to carriers, with no countervailing benefit. Grant of a stay will avoid wasting valuable carrier resources – resources which can be instead devoted to restoring actual outages.

For the foregoing reasons, MCI urges the Commission to grant USTA's Petition for Partial Stay.

Respectfully submitted,
MCI, Inc.

/S/ Dennis W. Guard Jr.

Dated: November 26, 2004

Dennis W. Guard, Jr.
MCI, INC.
1133 Nineteenth St., N.W.
Washington, D.C. 20036
(202) 736-6148

Certificate of Service

I, Dennis W. Guard, Jr., hereby certify that on this 26th day of November, 2004, I caused a true and correct copy of the foregoing MCI Comments in Support of the United States Telecom Association's Petition for Partial Stay to be mailed by electronic mail to:

James W. Olson
United States Telecom Association
jolson@usta.org

Michael T. McMenamin
United States Telecom Association
mmcmenamin@usta.org

/s/ Dennis W. Guard Jr.
Dennis W. Guard, Jr.